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January 22, 2013

State of Maryland Open Meetings Compliance Board  
200 St. Paul Place  
Baltimore, Maryland 21202

Re: *Response of the University System of Maryland Board of Regents  
To the Complaints of Ralph Jaffe and Craig O'Donnell*

Dear Board Members:

Attached for your consideration, please find the University System of Maryland Board of Regents' ("Regents") responses to the complaints filed by Ralph Jaffe and Craig O'Donnell concerning the Regents' meetings of November 18, 2012, and November 19, 2012. I wish to acknowledge the substantial assistance on this response of DLA Piper, which was engaged at the request of the Chancellor and Chair of the Board of Regents to provide them with independent advice and counsel with respect to this matter.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas Faulk".

Thomas Faulk  
Assistant Attorney General

Attachments

**University System of Maryland Board of Regents’  
Response to Open Meetings Act Complaint  
(Ralph Jaffe)**

On or about November 27, 2012, Ralph Jaffe filed a complaint with the Open Meetings Compliance Board (“OMCB”) asserting that “the recent vote of the University of Maryland Board of Regents to approve the University of Maryland switching its athletic conference membership from the ACC to the Big Ten Conference was done illegally.” Mr. Jaffe further contended that, “in [his] opinion this [the claimed “vote”] is a violation of the Maryland Open Meetings Act,” and he asked the OMCB “to enforce the aforementioned act and require the University of Maryland Board of Regents to conduct the vote again in open session.” Mr. Jaffe is wrong in his facts, and he is wrong in his conclusion that there was a violation of the Open Meetings Act. In fact, the University System of Maryland (“USM”) Board of Regents (the “Board”) was not required to act with respect to the University of Maryland’s (“UMD”) decision to switch athletic conferences, the Board did not hold a vote on that matter, and the Board’s activities with respect to the conference switch were properly conducted in closed session. As more fully explained below, the OMCB should reject Mr. Jaffe’s application.

**The Facts<sup>1</sup>**

As early as November 17, 2012, the press was reporting that UMD may join the Big Ten Conference (the “Big Ten”). See Alex Prewitt, “University of Maryland in Talks to Join the Big Ten,” *The Washington Post*, November 17, 2012. On November 18, 2012, the Board convened a meeting via telephone conference call during which, among other things, Wallace Loh, President of UMD, briefed it about a potential contract by which UMD would agree to join the Big Ten

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<sup>1</sup> In responding to Mr. Jaffe’s two-sentence complaint, the Board recites herein only those facts necessary to address the discrete issues presented. To the extent necessary or helpful, the Board refers the OMCB to the Board’s presentation of certain additional facts as set forth in its response to a separate complaint filed by Craig O’Donnell on November 26, 2012.

(the "UMD/Big Ten Contract"). See Board Minutes, November 18, 2012. The Board's legal counsel, the Assistant Attorney General, participated in the conference telephone call. Chairman Shea began that Board meeting by acknowledging that the Board was meeting in closed session. The fact that the Board would meet in closed session was vetted and approved by the Attorney General's Office, the Board's legal counsel. Chairman Shea emphasized the need for confidentiality concerning the discussion of the UMD/Big Ten Contract. President Loh had signed a non-disclosure agreement that contained strict confidentiality terms, as the negotiations with the Big Ten involved the disclosure of proprietary and highly sensitive commercial and financial information regarding, among other things, the Big Ten's finances, the finances of the Big Ten Network ("BTN") and related, lucrative television contracts, as well as proprietary information concerning academic initiatives and benefits that UMD would enjoy as a Big Ten member. Chairman Shea, therefore, reiterated that there could be no information leaks without jeopardizing the potential deal. Assistant Attorney General Thomas Faulk then advised the Board that it may properly meet in closed session, and he addressed related legal concerns.

UMD President Wallace Loh and Athletic Director Kevin Anderson then briefed the Board concerning the UMD/Big Ten Contract. The Regents had many questions for President Loh, and they had a good, robust discussion about the UMD/Big Ten Contract. During their deliberation, the Board discussed the economics of the UMD/Big Ten Contract and potential exit fee that UMD might have to pay upon leaving the Atlantic Coast Conference (the "ACC"). The Board also discussed the prospective possible uses of funds received from the Big Ten. Following its deliberations, the Board planned to reconvene the next day, November 19, 2012.

Prior to the Board's meeting on November 19, 2012, President Loh entered into the UMD/Big Ten Contract. As reflected in the minutes of the Board's meeting on November 19,

2012, thirteen members of the Board “endorsed” that decision, and one member of the Board did not.

**No Board Action was Required**

Board action with respect to the UMD/Big Ten Contract was not required; UMD could, and properly did, switch athletic conferences without Board action. President Loh had the authority to enter into the UMD/Big Ten Contract pursuant to the Bylaws of the Board of Regents of the University System of Maryland (the “Bylaws”). UMD is a USM “constituent institution.” Md. Code Ann., Educ. § 12-101(b)(5). The Board has mandated that, among other things, the president of “each [USM] constituent institution shall” “enter into contracts and cooperative agreements”; “regulate and administer athletic and student activities”; and “be responsible for all academic matters.” Bylaws, Article V, §§ 4(I), (L), and (O). This direction reflects, and is both consistent with and within, the Board’s authority and responsibility to manage the affairs of the USM and its constituent institutions. *See* Md. Code Ann., Educ. § 12-104(k)(1)(i) (delegating “any part of [the Board’s] authority over the affairs of the University to the Chancellor or the presidents”); *see also* Bylaws, Article I, §§ 4 (power to make rules and policies), 5 (power to delegate authority); Board Policy I-7.01, Appx., § II.C (referring to the Board’s statutory authority to delegate powers). These powers are separately invested directly in the president by statute. *See* Md. Code Ann., Educ. § 12-109(e)(9), (12), and (15).

The USM revised its policy on intercollegiate athletics effective September 28, 2012. *See* USM Policy V-2.10. That policy provides that the President should inform the Chancellor, who in turn should inform the Board in a timely manner, regarding any events which “might spark unusual interest in the athletic program....” *Id.* at p. 3. The November 18 and 19 meetings fulfilled this policy of providing timely information to the Board. A review of other Board

policies confirms President Loh's authority to enter into the UMD/Big Ten Contract. Certain agreements require Board review or approval prior to execution, such as "contracts for highly-compensated personnel," Board Policy VII-10.0, and contracts for "all procurement contracts of \$5 million or more." Board Policy VIII-3.10(1). The Board's selective promulgation of policies requiring its participation in the making of particular kinds of contracts strongly suggests that it would have and could have constrained President Loh's authority to enter into agreements such as the UMD/Big Ten Contract if it desired. The absence of any such rule or policy implies that President Loh was free to do so. Past precedent, moreover, sanctions President Loh's entry into the UMD/Big Ten Contract. Towson University, the University of Maryland Baltimore County and Frostburg State University, each USM constituent institutions, like UMD, have changed athletic conferences without Board approval.

**No Vote Occurred**

As the Board's minutes reflect, the Board did not hold a "vote"; it endorsed a decision already made. See Minutes of November 18 and 19, 2012 meetings. Even if its endorsement of President Loh's entry into the UMD/Big Ten Contract were considered a vote (which it was not), that action had no legal effect because President Loh had the authority to enter into the UMD/Big Ten Contract.

**Board Activities were Proper for Closed Session**

Mr. Jaffe, relying only on his "opinion," and without reference to the Open Meetings Act, concludes that the Board violated the Open Meetings Act and should "vote again in open session." As discussed above, no "vote" was taken, nor was one required. Thus, the Board need not take any further action on this matter. The Board's consideration of the UMD/Big Ten

Contract, moreover, was properly the subject of a closed meeting and did not violate the Open Meetings Act.

There are many reasons why the Board's actions in closed session were proper under the Open Meetings Act. First and foremost, if the Board is to effectively operate it must have the opportunity to deliberate privately, especially concerning such sophisticated agreements as the UMD/Big Ten Contract, the terms of which not only address multiple millions of dollars in revenue, but how those funds are generated, shared and paid, as well as the academic and research initiatives attendant with joining the Big Ten. In fact, the Open Meetings Act contemplates closed sessions for just that reason. *See* Md. Code Ann., State Gov't, §§ 10-508(a) (listing permissible categories of discussion in closed session). To contend otherwise ignores the realities of the highly competitive environment in which institutions of higher education operate.

Accepting Mr. Jaffe's "opinion" that the Board should act with respect to the UMD/Big Ten Contract in open session would effectively handcuff UMD and place it at a tremendous disadvantage relative to its peers. Thus, the Open Meetings Act permits closed sessions to "discuss a matter directly related to negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." Md. Code Ann., State Gov't, § 10-508(a)(14). Certainly, this exception – allowing private discussion when a public airing might compromise the public body's ability to obtain the contract or the most favorable terms for a contract – applies to the November 18 and 19, 2012 meetings.

At the Big Ten's behest, President Loh had signed a non-disclosure agreement with strict confidentiality provisions meant to safeguard and keep private the highly sensitive commercial and financial information that was shared with UMD in the course of negotiating the UMD/Big

Ten Contract. Had this information become public, it may have exposed UMD to liability, scuttled the deal and/or adversely affected UMD's interests, including its ability to achieve the most favorable terms possible. Discussion of aspects of this highly sensitive commercial and financial information was likely (and, in fact, took place) during the Board's meetings on November 18 and 19 and, therefore, it was reasonable and permissible under the Open Meetings Act to hold such deliberations in closed session. *See* Md. Code Ann., State Gov't §§ 10-508(a)(13), 10-617(d).

Moreover, the Big Ten's contemporaneous pursuit of Rutgers, the State University of New Jersey, which announced that it had struck a deal to join the Big Ten the day after UMD, demonstrates the competitive nature of UMD's negotiations to join the Big Ten, which separately warranted the confidentiality protections that a closed meeting would supply. Public knowledge of the fact that UMD was considering joining the Big Ten or, worse, of the terms it was seeking in such a deal, if not fatal would have adversely affected its bargaining position relative to Rutgers and other schools interested in joining the Big Ten, the bounds of whose desire to expand were unknown to UMD.

Were this not sufficient justification for the Board to consider the UMD/Big Ten Contract in closed session (which it is), still other grounds exist. Meetings may be closed when the Board consults with counsel for legal advice. Md. Code Ann., State Gov't, §§ 10-508(a)(7), (8). This exception is applicable for portions of the November 18 and 19, 2012, meetings, as the Board discussed legal issues related to the decision to leave the ACC regarding the decision to leave that conference. Meetings may also be closed when the Board is considering a "matter that concerns the proposal for a business . . . organization to locate [or] expand . . . in the State." Md. Code Ann., State Gov't, § 10-508(a)(4). The UMD/Big Ten Contract involves both the Big Ten

and BTN locating or expanding in Maryland. The Big Ten will expand to include UMD, and the BTN will expand to include the Baltimore-Washington metropolitan area.

These legitimate grounds to close the meetings reflect the policy that permits public bodies to receive facts, critically consider and debate them, and take action free from pressure and non-informative distractions. This same principle is evident in the protection of juror or judge deliberations after a trial, which are privately conducted before a judgment or verdict and the reasons therefore are publicly announced, and in the process of crafting legislation, whereby legislators caucus behind closed doors before proposing new laws.

### **CONCLUSION**

For all of the foregoing reasons, the OMCB should reject Mr. Jaffe's complaint and find that the Board did not violate the Open Meetings Act.



**University System of Maryland Board of Regents’  
Response to Open Meetings Act Complaint  
(Craig O’Donnell)**

On or about November 26, 2012, Craig O’Donnell filed a complaint with the Open Meetings Compliance Board (the “OMCB”) asserting that the University System of Maryland (“USM”) Board of Regents (the “Board”) violated the Open Meetings Act. In particular, Mr. O’Donnell claims that the Board failed to give proper notice of its meetings on November 18 and 19, 2012, and that the minutes of those meetings are, in various ways, deficient. As explained below, to the extent that the November 18 and 19 meetings were not properly noticed, the transgression was at worst technical, as the press and public were aware of those meetings before they occurred and reported on them in near-real-time. Any deficiency with respect to the minutes of those meetings, furthermore, will be rendered moot with the publication and adoption of revised minutes. In order to remove all doubt, the Board will refine its procedure for closing meetings. Nonetheless, the Board’s deliberations were properly held in closed session.

**The Facts**

Although still very much in doubt, on Thursday, November 15, 2012, the prospect of a deal by which the University of Maryland (“UMD”) may join the Big Ten Conference (the “Big Ten”) emerged. Chancellor Kirwan notified the Board that negotiations with the Big Ten were taking place, that they were the subject of a legally binding confidentiality agreement, and that if a proposal developed over the weekend, an executive session to update the Board would be held before a scheduled meeting of the Committee on Education Policy on Monday, November 19, 2012. The next day, November 16, 2012, Board representatives consulted with the Board’s counsel in the Attorney General’s Office about whether notice of such a meeting, which would take place on Monday, November 19, 2012, was necessary; they were told it was not.

By Saturday, November 17, 2012, the press had become aware of the possible conference switch. See, e.g., Peter Schmuck, "Moving to Big Ten, Maryland Would Toss Away Tradition for the Possibility of More Money," *The Baltimore Sun*, November 17, 2012; Alex Prewitt, "University of Maryland in Talks to Join the Big Ten," *The Washington Post*, November 17, 2012; Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland, Rutgers to Big Ten?" *ESPN.com*, November 17, 2012 (updated November 18, 2012 at 12:25 p.m.). Press coverage intensified throughout the weekend and into Monday, November 19, 2012, with daily reports on broadcast television and cable news outlets and widely distributed local and national print media.<sup>1</sup> See, e.g., Alex Prewitt, "University of Maryland in Talks to Join Big Ten," *The Washington Post*, November 17, 2012; Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland, Rutgers to Big Ten?" *ESPN.com*, November 17, 2012 (updated November 18, 2012 at 12:25 p.m.); Alex Prewitt, "University of Maryland Poised to Join the Big Ten," *The Washington Post*, November 18, 2012; Associated Press, "Maryland Nears Decision on Move to Big Ten," November 18, 2012 (available on <http://baltimore.cbslocal.com>); Alex Prewitt, "Maryland Big Ten: Student

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<sup>1</sup> In fact, *The Baltimore Sun* published 17 stories related to the conference switch between Saturday evening, November 17, 2012, and Monday afternoon, November 19, 2012. See, Peter Schmuck, "Moving to Big Ten, Maryland Would Toss Away Tradition for the Possibility of More Money," *The Baltimore Sun*, November 17, 2012 at 7:01 p.m.; Teddy Greenstein, "Report: Big Ten May Add Maryland, Rutgers," *The Baltimore Sun*, November 17, 2012 at 8:14 p.m.; Jeff Barker, "Maryland President Loh to Brief Regents About Big Ten Proposal," *The Baltimore Sun*, November 18, 2012 at 7:28 a.m.; Jeff Barker, "Maryland Considering a Move to the Big Ten Conference," *The Baltimore Sun*, November 18, 2012 at 7:43 a.m.; Don Markus, "Ex-coach Gary Williams Says Move to Big Ten Would Help UM," *The Baltimore Sun*, November 18, 2012 at 9:18 a.m.; Don Markus, "Ex-ACC Commissioner Corrigan 'Flabbergasted' About Maryland Big Ten," *The Baltimore Sun*, November 18, 2012 at 4:26 p.m.; Teddy Greenstein, "Delany Looking Long Term with Big Ten Expansion Bid," *The Baltimore Sun*, November 18, 2012 at 5:55 p.m.; Jeff Barker, "Maryland to Big Ten Proposal Creates a Debate within a Debate," *The Baltimore Sun*, November 18, 2012 at 8:28 p.m.; Jeff Barker, "Maryland Could Announce Move to Big Ten Today," *The Baltimore Sun*, November 18, 2012 at 10:07 p.m.; Jeff Barker, "Maryland Close to Joining Big Ten," *The Baltimore Sun*, November 18, 2012 at 10:10 p.m.; Don Markus, "Change Will Be Good for Maryland Sports," *The Baltimore Sun*, November 19, 2012 at 5:00 a.m.; Don Markus, "Big Ten Move for Maryland no Big Surprise to Bobby Ross," *The Baltimore Sun*, November 19, 2012 at 10:32 a.m.; Peter Schmuck, "As the College Sports World Turns," *The Baltimore Sun*, November 19, 2012 at 2:34 p.m.; Teddy Greenstein, "Maryland Approves Move to Big Ten; Rutgers Next," *The Baltimore Sun*, November 19, 2012 at 1:30 p.m.; Childs Walker, Jeff Barker, Chris Korman, "Maryland's Application for Big Ten Admission Approved," *The Baltimore Sun*, November 19, 2012 at 3:27 p.m.; Don Markus, "Big Ten Move Took Maryland Coaches by Surprise," *The Baltimore Sun*, November 19, 2012 at 4:37 p.m.; Kevin Cowherd, "Dollar Signs Blind Maryland Officials in Move to Big Ten," *The Baltimore Sun*, November 19, 2012 at 4:43 p.m.

Government Endorses Conference Switch," *The Washington Post*, November 19, 2012; Brett McMurphy, Dana O'Neil, "Maryland Accepts Big Ten Invite," *ESPN.com*, November 19, 2012 (updated November 20, 2012 at 12:05 p.m.); Jenna Johnson, "Legality of University System of Maryland's Big Ten Vote Questioned," *The Washington Post*, November 20, 2012.

As quickly as word spread, so too did the potential deal with the Big Ten evolve. In light of the rapidly advancing negotiations with the Big Ten, on Saturday, November 17, 2012, the Board's leadership decided to utilize the opportunity of a pre-existing meeting of the Board's intercollegiate athletics working group, which had been set for Sunday afternoon, November 18, 2012, so that Wallace Loh, President of UMD, could brief the Board about the potential contract by which UMD would agree to join the Big Ten (the "UMD/Big Ten Contract"). See Board Minutes, November 18, 2012. The Board's legal counsel, the Assistant Attorney General, had been copied on all correspondence related to scheduling the meeting of the Board's intercollegiate athletics working group. He was also copied on the communications expanding that meeting to include the full Board so that it may discuss the UMD/Big Ten Contract, but did not advise that notice would be required for the expanded meeting (consistent with prior guidance that notice of the anticipated meeting on Monday, November 19, 2012, regarding the same subject matter, was unnecessary). Counsel also participated in the telephone conference call.

Chairman Shea began the special Board meeting on Sunday, November 18, 2012, by acknowledging that the Board was meeting in closed session. The Board convened in closed session, as it had many times in the past, on the advice of its counsel, the Attorney General's Office. The fact that the Board would meet in closed session on this particular day was also vetted and approved by the Attorney General's Office.

In his opening remarks, Chairman Shea emphasized the need for confidentiality concerning the discussion of the UMD/Big Ten Contract. President Loh had signed a non-disclosure agreement that contained strict confidentiality terms, as the negotiations with the Big Ten involved the disclosure of proprietary and highly sensitive commercial and financial information regarding, among other things, the Big Ten's finances, the finances of the Big Ten Network ("BTN") and related, lucrative television contracts, as well as proprietary information concerning academic initiatives and benefits that UMD would enjoy as a Big Ten member. The non-disclosure agreement even protected the fact of negotiations between UMD and the Big Ten. Chairman Shea, therefore, reiterated that there could be no information leaks without jeopardizing the potential deal. Assistant Attorney General Thomas Faulk then advised the Board that it may properly meet in closed session, and he addressed related legal concerns.

UMD President Wallace Loh and Director of Athletics Kevin Anderson then briefed the Board concerning the UMD/Big Ten Contract. The Regents had many questions for President Loh, and they had a good, robust discussion about the UMD/Big Ten Contract. During their deliberation, the Board discussed the economics of the UMD/Big Ten Contract and potential exit fee that UMD might have to pay upon leaving the Atlantic Coast Conference (the "ACC"). The Board also discussed the prospective possible uses of funds received from the Big Ten. Following its deliberations, the Board concluded the telephone call and planned to reconvene the next day, November 19, 2012.

Notwithstanding the late time at which the Board convened on November 18 – 4:30 p.m. – the press was aware of the meeting and reported the substance of the Board's discussion that same day. *The Washington Post* reported that "President Loh . . . briefed the board on the proposal [to join the Big Ten] via telephone late Sunday afternoon" and that the Board would

“meet early Monday morning in a private session in Baltimore to decide whether [UMD] should join the 12-member Big Ten . . . .” Alex Prewitt, “University of Maryland Poised to Join the Big Ten,” *The Washington Post*, November 18, 2012. Indeed, press accounts of the November 18 meeting were so detailed as to include verbatim questions posed during the closed session, although the speakers and information sources remained anonymous. *Id.* Even UMD’s student government had promptly learned about, and supported, the move to the Big Ten. Late Sunday night, November 18, 2012, UMD’s student government issued an open letter to President Loh, Chancellor Kirwan and the Board endorsing UMD’s reported move to the Big Ten. Alex Prewitt, “Maryland Big Ten: Student Government Endorses Conference Switch,” *The Washington Post*, updated November 19, 2012.

No later than Sunday afternoon, November 18, 2012, ESPN reported that “the Maryland board of regents will meet at 9 a.m. Monday morning [November 19, 2012] to decide on the move, a source with direct knowledge told ESPN.com Sunday morning [November 18, 2012].” Dana O’Neil, Brett McMurphy, Andy Katz, “Maryland, Rutgers to Big Ten?” *ESPN.com*, November 17, 2012 (updated November 18, 2012 at 12:25 p.m.); Dana O’Neil, Brett McMurphy, Andy Katz, “Maryland Uber-Booster Favors Move,” *ESPN.com*, November 18, 2012. The Board’s Committee on Education Policy had a preexisting meeting scheduled for Monday morning, November 19, 2012, at the University of Baltimore. Mindful of the non-disclosure agreement that President Loh had signed and to mitigate concerns that the press, which had thus far proved able to gain details of closed meetings despite the Board’s efforts at privacy, may learn the particulars of the highly confidential UMD/Big Ten Contract, the Board decided to continue its closed session from the previous day at the University of Maryland at Baltimore’s Saratoga Building, located at 220 Arch Street, in Baltimore, Maryland. The meeting

of the Committee on Education Policy was moved back one half-hour to accommodate the full Board's continued discussions of the UMD/Big Ten Contract earlier in the morning on November 19, 2012. Assistant Attorney General Faulk was consulted regarding, and copied on the e-mail correspondence setting, the time and location for the continued, closed meeting of the Board, and, in response to inquiries from USM staff, he approved the logistics.

The Board reconvened at 8:30 a.m. on November 19, 2012—just a half hour prior to the meeting time that ESPN reported the previous day. See Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland Uber-Booster Favors Move," *ESPN.com*, November 18, 2012; Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland, Rutgers to Big Ten?" *ESPN.com*, November 17, 2012 (updated November 18, 2012 at 12:25 p.m.). As reflected in the minutes of the Board's meeting on the morning of November 19, thirteen members of the Board "endorsed" President Loh's decision to join the Big Ten, and one member of the Board did not. The Board adjourned its meeting at 10:30 a.m. Members of the Board's Committee on Education Policy then left to attend their previously scheduled and announced meeting. When those members of the Board arrived at the University of Baltimore – within a half hour of Board's endorsement of the UMD/Big Ten Contract – the press greeted them and learned of the Board's activities earlier in the morning. Later that day, UMD announced its decision to join the Big Ten at a press conference.

#### **Notice and Deliberation in Closed Session**

Any discussion of the Board's compliance with the notice provisions of the Open Meetings Act must start by acknowledging that the press, in fact, had advanced notice of both the November 18 and November 19 meetings and that during each of those meetings the Board would discuss the UMD/Big Ten Contract. Relying on the advice of counsel, and due to the

rapid evolution of the UMD/Big Ten Contract and the growing intensity of press coverage that posed a threat to UMD's ability to achieve the most favorable possible terms in that bargain, if not to the deal itself (it may have been scuttled if details became public), however, the Board did not provide official notice of its meetings on November 18 and 19, 2012. Nonetheless, those exigent circumstances did not stop the press from learning in advance the fact that those meeting would occur and what would be discussed or from learning in near-real-time what occurred during those meetings and where they were held.

On November 17, *The Washington Post*, among others, reported that the Board would meet the next day concerning a proposed deal to join the Big Ten. See Alex Prewitt, "University of Maryland in Talks to Join Big Ten," *The Washington Post*, November 17, 2012. That press article effectively communicated the fact that a Board meeting would occur, the agenda item to be discussed and even reported aspects of the rationale in support of the then-potential conference switch:

According to one individual privy to internal discussions within the Maryland athletic department, the school is also considering the move because of academics. Big Ten members, along with the University of Chicago, a former member of the conference, comprise the Committee on Institutional Cooperation, a consortium in which members collaborate on academic endeavors. Opportunities for expanding research in the agricultural, biotechnological and engineering fields, the individual said, presented an enticing allure for Maryland.

*Id.* Members of the public also knew about the proposed move to the Big Ten prior to any Board meeting about the matter. See *id.* (reporting that "as of 9:45 p.m. Saturday night [November 17, 2012], a Facebook group entitled 'Keep UMD in the ACC!' had more than 300 members."). Indeed, the press reported Sunday morning, November 18, 2012, that President Loh would "brief the Board of Regents via telephone late Sunday afternoon about the school's possible move to the Big Ten, two individuals with direct knowledge of the situation said Sunday morning." Alex

Prewitt, "Maryland President Wallace Loh to Brief Board of Regents on Big Ten Move," *The Washington Post*, November 18, 2012, at 11:43 a.m. That evening, after the meeting, the press reported verbatim questions asked and comments made during the closed session, as well as the post-meeting reaction of "multiple individuals with firsthand knowledge of the situation." See Alex Prewitt, "University of Maryland Poised to Join the Big Ten," *The Washington Post*, November 18, 2012. The same occurred with the follow-up meeting the next day.

On Sunday, November 18, 2012, the press reported that the Board would meet again the next morning about the UMD/Big Ten Contract. See *id.*; Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland Uber-Booster Favors Move," *ESPN.com*, November 18, 2012; Dana O'Neil, Brett McMurphy, Andy Katz, "Maryland, Rutgers to Big Ten?" *ESPN.com*, November 17, 2012 (updated November 18, 2012 at 12:25 p.m.). Within minutes of that meeting the press learned and reported the action taken and comments made during that meeting. See, e.g., Brett McMurphy, Dana O'Neil, "Maryland Accepts Big Ten Invite," *ESPN.com*, November 19, 2012 (responsive comments posted as early as 11:18 a.m. on November 19, 2012). Notice of the November 18 and 19 meetings, therefore, in fact occurred.

The press reported, and commentators on whom it relied acknowledged, moreover, that even had the meetings been officially noticed in accordance with the letter of the Act, the Board was permitted to receive legal advice and discuss the highly confidential and proprietary commercial and financial information that were certain to (and did) dominate the discussion of the UMD/Big Ten Contract behind closed doors. See Jenna Johnson, "Legality of University System of Maryland's Big Ten Vote Questioned," *The Washington Post*, November 20, 2012. And they were right: There are many reasons why the Board's actions in closed session were proper under the Open Meetings Act.



First and foremost, if the Board is to effectively operate it must have the opportunity to deliberate privately, especially concerning such sophisticated agreements as the UMD/Big Ten Contract, the terms of which not only address multiple millions of dollars in revenue, but how those funds are generated, shared and paid, as well as the academic and research initiatives attendant with joining the Big Ten. In fact, the Open Meetings Act contemplates closed sessions for just that reason. See Md. Code Ann., State Gov't, §§ 10-508(a) (listing permissible categories of discussion in closed session). To contend otherwise ignores the realities of the highly competitive environment in which institutions of higher education operate. The Open Meetings Act permits closed sessions to "discuss a matter directly related to negotiating strategy or the contents of a bid or proposal, if public discussion or disclosure would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." Md. Code Ann., State Gov't, § 10-508(a)(14). Certainly, this exception – allowing private discussion when a public airing might compromise the public body's ability to obtain the contract or the most favorable terms for a contract – applies to the November 18 and 19, 2012 meetings.

At the Big Ten's behest, President Loh had signed a non-disclosure agreement with strict confidentiality provisions meant to safeguard and keep private the highly sensitive commercial and financial information that was shared with UMD in the course of negotiating the UMD/Big Ten Contract. Had this information become public, it may have exposed UMD to liability, adversely affected UMD's interests, including its ability to achieve the most favorable terms possible, and/or scuttled the deal. Discussion of aspects of this highly sensitive commercial and financial information was likely (and, in fact, took place) during the Board's meetings on November 18 and 19, therefore, it was reasonable and permissible under the Open Meetings Act

to hold such deliberations in closed session. See Md. Code Ann., State Gov't §§ 10-508(a)(13), 10-617(d).

Moreover, the Big Ten's contemporaneous pursuit of Rutgers, the State University of New Jersey, which announced that it had struck a deal to join the Big Ten the day after UMD, demonstrates the competitive nature of UMD's negotiations to join the Big Ten, which separately warranted the confidentiality protections that a closed meeting would supply. Public knowledge of the fact that UMD was considering joining the Big Ten or, worse, of the terms it was seeking in such a deal, if not fatal would have adversely affected its bargaining position relative to Rutgers and other schools interested in joining the Big Ten, the bounds of whose desire to expand were unknown to UMD.

Were this not sufficient justification for the Board to consider the UMD/Big Ten Contract in closed session (which it is), still other grounds exist. Meetings may be closed when the Board consults with counsel for legal advice. See Md. Code Ann., State Gov't, §§ 10-508(a)(7), (8). This exception is applicable for portions of the November 18 and 19, 2012, meetings, as the Board discussed legal issues related to the decision to leave the ACC. Meetings may also be closed when the Board is considering a "matter that concerns the proposal for a business . . . organization to locate [or] expand . . . in the State." Md. Code Ann., State Gov't, § 10-508(a)(4). The UMD/Big Ten Contract involves both the Big Ten and BTN locating or expanding in Maryland. The Big Ten will expand to include UMD, and the BTN will expand to include the Baltimore-Washington metropolitan area.

These legitimate grounds to close the meetings reflect the policy that permits public bodies to receive facts, critically consider and debate them, and take action free from pressure and non-informative distractions. This same principle is evident in the protection of juror or

judge deliberations after a trial, which are privately conducted before a judgment or verdict and the reasons therefore are publicly announced, and in the process of crafting legislation, whereby legislators caucus behind closed doors before proposing new laws. The grounds for closing the Board's meetings also defeat, in principal part, the practical need for notice, as the press and public would have been foreclosed from observing the Board's deliberations even had they shown up at the meetings on November 18 and 19, 2012.

Two additional points further dilute the practical need for timely, official notice in the unique, exigent circumstances surrounding the Board's meetings related to the UMD/Big Ten Contract. First is the fact that no Board action was even required to enter into that agreement. President Loh had the authority to enter into the UMD/Big Ten Contract pursuant to the Bylaws of the Board of Regents of the University System of Maryland (the "Bylaws"). UMD is a USM "constituent institution." Md. Code Ann., Educ. § 12-101(b)(5). The Board has mandated that, among other things, the president of "each [USM] constituent institution shall" "enter into contracts and cooperative agreements"; "regulate and administer athletic and student activities"; and "be responsible for all academic matters." Bylaws, Article V, §§ 4(I), (L), and (O). This direction reflects, and is both consistent with and within, the Board's authority and responsibility to manage the affairs of the USM and its constituent institutions. *See* Md. Code Ann., Educ. § 12-104(k)(1)(i) (delegating "any part of [the Board's] authority over the affairs of the University to the Chancellor or the presidents"); *see also* Bylaws, Article I, §§ 4 (power to make rules and policies), 5 (power to delegate authority); Board Policy I-7.01, Appx., § II.C (referring to the Board's statutory authority to delegate powers). These powers are separately invested directly in the president by statute. *See* Md. Code Ann., Educ. § 12-109(e)(9), (12), and (15).

The USM revised its policy on intercollegiate athletics effective September 28, 2012. See USM Policy V-2.10. That policy provides that the President should inform the Chancellor, who in turn should inform the Board in a timely manner, regarding any events which “might spark unusual interest in the athletic program....” *Id.* at p. 3. The November 18 and 19 meetings fulfilled this policy of providing timely information to the Board. A review of other Board policies confirms President Loh’s authority to enter into the UMD/Big Ten Contract. Certain agreements require Board review or approval prior to execution, such as “contracts for highly-compensated personnel,” Board Policy VII-10.0, and contracts for “all procurement contracts of \$5 million or more.” Board Policy VIII-3.10(1). The Board’s selective promulgation of policies requiring its participation in the making of particular kinds of contracts strongly suggests that it would have and could have constrained President Loh’s authority to enter into agreements such as the UMD/Big Ten Contract if it desired. The absence of any such rule or policy implies that President Loh was free to do so. Past precedent, moreover, sanctions President Loh’s entry into the UMD/Big Ten Contract. Towson University, the University of Maryland Baltimore County and Frostburg State University, each USM constituent institutions, like UMD, have changed athletic conferences without Board approval.

Second, as the Board’s minutes reflect, the Board did not hold a “vote”; it endorsed a decision already made. See Minutes of November 18 and 19, 2012 meetings. Even if its endorsement of President Loh’s entry into the UMD/Big Ten Contract were considered a vote (which it was not), that action had no legal effect because President Loh had the authority to enter into the UMD/Big Ten Contract.

### *The Minutes*

Mr. O'Donnell's complaints that the minutes of the November 18 and 19, 2012 meetings in various ways do not comply with the Open Meetings Act will be remedied with the publication of revised minutes, thus mooted this issue. Nonetheless, it is important to understand that the Board's conduct of the November 18 and 19 meetings, like all other Board or Board committee meetings, was informed by, and complied with, the advice it received from the Attorney General's office. When the Board convenes and when it adjourns to a closed session, the Board Chairman reads from a script developed by the Attorney General's office. The Board relies on legal advice from the Attorney General's office to avoid the sort of technical violations of which Mr. O'Donnell complains when he notes that the closing statement was insufficient or that no vote was taken to enter closed session. The Board's counsel in the Attorney General's office, moreover, reviewed and endorsed the minutes of the November 18 and 19, 2012 meetings before they were submitted for approval.

As concerns the complaint that the Board's minutes of the November 19 meeting do not identify each member's position vis-à-vis the UMD/Big Ten Contract, or any contract, for that matter, there are legitimate policy concerns that weigh in favor of reporting this information in the aggregate, as was done in this instance, and against disclosure of person-specific information. In short, identifying Board members by their position on a matter is likely to chill deliberation. In the specific context of the Board's consideration of the UMD/Big Ten Contract during the November 19, 2012 meeting, moreover, the Board was under no obligation to identify each member's position on that agreement since the Board did not vote on it; the Board members simply endorsed it, or not, as the case may be, and the minutes of that meeting accurately and adequately reflect that action.

The minutes of the November 18 and 19 meetings, furthermore, adequately describe the matters discussed and are sufficient under the Open Meetings Act. Mr. O'Donnell's suggestion that they are "jargon or boilerplate" is unavailing. The Open Meetings Act "does not specify the level of detail" required to describe an item that the Board addressed. The Open Meetings Act Manual advises that "the description should be sufficient so that a member of the public who examines the minutes . . . can understand what the issue was." *Open Meetings Act Manual*, 3-8 (7th ed. October 2010). With respect to the UMD/Big Ten Contract, the minutes appropriately identify UMD – referred to in the minutes as UMCP, an acronym that is immediately identifiable as referring to the University of Maryland College Park – and state accurately that the Board was addressing "a proposal" whereby that institution would "move from the ACC to the Big Ten," two of the most prominent and recognizable intercollegiate athletic conferences in the nation. This statement conveys the essential information necessary to inform anyone reading the minutes that UMD was considering switching athletic conferences. No more need be stated.

The description of the agenda item related to Towson State University is also sufficient under the Open Meetings Act. The press has been awash in recent months with news that Towson State University is considering reducing the number of intercollegiate athletic programs that it sponsors. In that context, the minutes appropriately inform the public that "the regents were briefed on the status of an ICA [intercollegiate athletics] review for Towson State University." These descriptions are far from "jargon" or "boilerplate." They utilize well-known acronyms and relate details that adequately inform readers of the Board's agenda.

### **Future Meetings**

Despite the fact that the meetings involved matters which the Open Meetings Act permits to be discussed in closed session, and despite the fact that the public was fully and timely

informed of what transpired at those meetings, the Board is committed to scrupulously adhering to the Act's requirements while preserving the level of privacy required to effectively deliberate and conduct its business. Recognizing the important public interest in strict compliance, the Board, with the continued assistance of counsel, will meet in closed session only after following the procedures enumerated below:

1. The Board will redouble its efforts to provide the best notice of contemplated meetings as is practicable under the circumstances, in writing, complete with the date, time, and location of the meeting, and a statement "that a part or all of the meeting will be conducted in closed session," as the Open Meetings Act requires. *Id.* at § 10-506(b);
2. At the meeting, and before going into closed session, the Board will hold, on a motion stating the legal basis for the closing that is properly seconded, a "recorded vote" to close the session and "make a written statement of the reason for closing the meeting," which cites to the part of the Open Meetings Act that permits the closed session (*i.e.*, one of the enumerated exceptions to the open meeting rule stated in § 10-508(a)) and the topics to be discussed. Md. Code Ann., State Gov't, § 10-508(d)(2)(i)-(ii); and
3. Prepare minutes of the closed session that:
  - a. state when, where and for what purpose the closed session was held, *id.* at § 10-509(c)(2)(i);
  - b. reflect each Board member's vote on whether to close the meeting, *id.* at § 10-509(c)(2)(ii);
  - c. cite the Open Meetings Act provision that sanctions the closed session, *id.* at § 10-509(c)(2)(iii); and
  - d. list the matters discussed, persons present and each action taken while the meeting was closed. *Id.* at § 10-509(c)(2)(iv).

Exigent circumstances, such as those occurring here, occasionally require meetings to be convened via telephone. The provisions of the Act requiring notice and a vote for closure in open session pose logistical challenges for telephonic meetings, yet the Board has developed a process by which the exact letter of the Act can be followed. They are:

1. Giving the required notice described above, and adding to it a telephone conference number that the Board and public may utilize to join the open session and hear the vote to adjourn to a closed session;
2. Dialing-in to the open portion of the meeting, announce a vote to close the session, stating the reasons therefore and referring to the Open Meetings Act section(s) that permit the closed meeting, and hold the required recorded vote; and
3. Then hanging-up from the public telephone conference and dialing-in to a second, unpublished telephone conference number to conduct the closed portion of the meeting. Before doing so however, the Board will announce that it will dial back in to the public line at the conclusion of its closed session if necessary and appropriate.

### CONCLUSION

While the Board did not strictly comply with the notice and vote for closure provisions of the Open Meetings Act, had it, the public would not have enjoyed any additional or more prompt access to the information discussed. As explained above, the subjects addressed during the closed sessions on November 18 and November 19, 2012, involved matters that the Open Meetings Act permits be discussed in closed session. The Board relied on the direction of the Attorney General's Office in setting up and conducting these meetings. In order to ensure that its procedures are unassailable in the future, the Board will follow the process outlined above.